IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

United States of America,	)	
	)	
Plaintiff,	)	
	)	3:17-cr-811
-versus-	)	3:19-cr-781
	)	March 15, 2022
Terrence Vernon Dunlap,	)	Columbia, SC
	)	
Defendant.	)	
_____	)	

BEFORE THE HONORABLE MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE, PRESIDING
Sentencing Hearing

A P P E A R A N C E S:

For the Government:	Jane Taylor, AUSA United States Attorney's Office 1441 Main Street, Suite 500 Columbia, SC 29201
For the Defendant:	Jonathan Harvey, Esq. Jonathan Harvey Law Office 1701 Richland Street Columbia, SC 29201
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STENOTYPE/COMPUTER-AIDED TRANSCRIPTION
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THE COURT: All right. Ms. Taylor?

MS. TAYLOR: If it please the Court, Your Honor. The first matter this morning is United States of America versus Terrence Vernon Dunlap, also known as Tex. Mr. Dunlap is present this morning represented by Mr. Jonathan Harvey and Mr. Chris Mills and -- oh, I believe that I need to put on the record two case numbers, and I only have one in front of me. Beg the Court's indulgence.

THE COURT: I think I have both of them.

MR. HARVEY: 19-781.

THE COURT: Yeah. It's 3:17-811 and 3:19-781. Yeah.

MS. TAYLOR: Thank you, Your Honor. I didn't put that in front of me.

Mr. Dunlap is here to be sentenced on both of those cases. One presentence report has been issued as to both, and Mr. Dunlap has filed objections to that presentence report.

THE COURT: All right. Thank you. All right. Mr. Harvey, is your client ready to proceed?

MR. HARVEY: Yes, Your Honor.

THE COURT: All right. I have reviewed the evidence that was presented at the trials, the combined -- or the trial and then the plea hearing, the combined presentence investigation report, the plea agreement in 3:19-781, the

preliminary order of forfeiture that was just filed, as well as your memorandum in support of the objections you lodged to the PSR and your motion for downward departure and variance.

Is there anything else that I need to look at before we get started?

MR. HARVEY: Nothing from me, Your Honor. No, ma'am.

THE COURT: Okay. All right. Then Mr. Dunlap, if you would stand, please. All right. Sir, have you had -- based on the objections that have been lodged, it looks to me like you have been over the report carefully with Mr. Harvey. Is that accurate?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Has he answered all of your questions about the report?

THE DEFENDANT: Yes, ma'am.

THE COURT: Mr. Dunlap, do you understand the contents of your presentence report?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Mr. Harvey, it obviously looks like you have been over this pretty carefully. Have you had enough time to explain all of that to your client?

MR. HARVEY: I have, Your Honor.

THE COURT: All right. You believe that Mr. Dunlap understands the presentence report?

MR. HARVEY: I do, Your Honor.

THE COURT: Okay. All right then. And then Mr. Dunlap, if you'd like to be seated, you may.

All right. Mr. Harvey, you have got a number of objections to the report. The first one being to the offense conduct, paragraphs 18, 23, 31 and 32. Be happy to hear from you on that. I have reviewed what you have filed, but I'd be happy to hear from you.

MR. HARVEY: Thank you, Your Honor. I would incorporate by reference my sentencing memorandum. And to the extent that it complements or augment my argument any comments by Mr. Mills in his case, this is somewhat unusual that we have two cases in one sentencing.

THE COURT: Yes.

MR. HARVEY: And two cases in one presentence report. Your Honor, the gist--

THE COURT: Mr. Harvey, just while you're talking on the record, if you would pull your mask down, I would appreciate it. I'm getting to be kind of hard of hearing, apparently.

MR. HARVEY: It's unusual for someone to ask me to talk more or speak up, so...

THE COURT: Well, I'm just referring to the volume, okay?

MR. HARVEY: Thank you, Your Honor. So Your Honor,

as outlined in the sentencing memo, I think if we look at the drug quantity issue maybe in tandem, so what we have in our case is we have the presentence report calculated the drug quantities based upon largely interpretation of wiretap conversations.

And as I conceded in the sentencing memorandum, we're not saying that that methodology hasn't been approved, hasn't been accepted and, in circumstances, can be found to be reliable. However, in this instance, what's critical is it has to be applied reliably in the context of the case.

And what I did, Your Honor, is I made a chart, and I actually have with me today a booklet, if we need to, to look at the line sessions. But in essence, the argument is that the unreliable application of the interpretation is that specifically the term, thing, has been used to mean an ounce quantity, and in its application it was given different quantity amounts. And in the chart, part of the chart was to show that it had been applied to mean an ounce.

So, the gist of that argument is the method's been approved, our courts have held if you use that method, it needs to be applied reliably.

THE COURT: Which means consistently.

MR. HARVEY: Yes.

THE COURT: Yeah. Okay.

MR. HARVEY: And so in this instance, the gist of

the argument is it was not applied consistently, and I would ask Your Honor to note that there wasn't an objection to the total amount of drugs. It wasn't a blanket objection.

And I want Your Honor to know that Mr. Dunlap understands that he wanted to make sure that this argument was presented in the right context rather than saying, well, everything is unreliable. That would strain credibility with the Court and I think be contra-productive for my client. But it's clear that that term was applied inconsistently.

And so by my calculation, what I did on the chart is I added up on chart A the grams listed in the column under cocaine weight, and that came to 2991.5 grams. I multiplied that by 200 and divided it by a thousand, and my University of Georgia math said that was 598.3 grams. And as a Georgia graduate, I must admit I relied on a calculator to do it.

So Your Honor, then I subtracted that amount from the presentence report weight, and that gave a cocaine weight of 1116.8. I guess that would be the kilograms in converted weight. I applied the same methodology with the heroin and, Your Honor, on the graph when we refer to session 7335, that was the most puzzling one in the entire matter because it was just -- I could not discern what that conversation was about.

And I have got it... and that was where a thousand grams came from, and I don't know if I could -- with the Court's permission, I guess in order to make sure that we have a

record, may I read that transcript into the record -- or Ms. Taylor, do you want to...

MS. TAYLOR: You may read it.

MR. HARVEY: Your Honor, so this is session 7334 looking at a transcript synopsis name Dante Cornbread, comma, Dante Bubba, Terrence Dunlap to SS, yo, Cornbread was looking for you. SS huh? Cornbread. Terrence, hey that nigga Dante, I told you that nigga saying shit, bro. Santerrio, what? Oh, boy dog, SS, who -- Terrence, man broke ass, broke man, for real Cornbread just told me that nigga said, you know what I'm saying. What that nigga be talking about just talking fuck that nigga, bro. Who? That old boy. Who? Bubba. Yeah. What that nigga be talking about? Terrence, some crazy ass shit. Yeah, he said Cornbread, you know what I'm saying. Yeah, but what going on? Santerrio, shit, he hit me, dog. Terrence, tell me, man, when the man's on the way. In a minute. I'm about to come over there.

That conversation was attributed a thousand kilograms of heroin. And so, again, the application -- there's no indication -- and that was taken in the presentence report in the context of that conversation. And so again, the objection is the consistent application. And--

THE COURT: You're saying it should--

MR. HARVEY: I don't know where--

THE COURT: Referring to that particular

conversation, you can't tell anything.

MR. HARVEY: I can't tell anything, but he was attributed a thousand kilograms. And Your Honor, I'm aware that there was a jury finding that he was found guilty of at least a hundred grams. So Your Honor, I -- while acknowledging that finding, and I had a preamble--

THE COURT: It was for heroin, it was 1 kilogram or more I think is what it was.

MR. HARVEY: I thought it was a hundred grams or more?

MS. TAYLOR: He was convicted of a hundred grams or more, I believe.

THE COURT: Okay. Well, I'm looking at a verdict form.

MR. HARVEY: I've got the verdict form here, Your Honor. On under--

MS. TAYLOR: On Mr. Pernell or Mr. Smith?

THE COURT: Maybe I'm looking at the wrong thing then.

MR. HARVEY: Mr. Dunlap was found guilty of a hundred grams or more of heroin.

THE COURT: Okay. I've got the wrong thing in front of me, I guess. Okay. I'm sorry. I'm looking at the wrong -- you're right. I'm sorry.

MR. HARVEY: So Your Honor, the -- again, it's...

THE COURT: Yeah, let's see. Okay. Yeah. Right. I got ya. Okay.

MR. HARVEY: Okay. So Your Honor, the drug weight calculation methodology is -- that's the gist of the drug weight calculation objection, and the chart refers to its inconsistent or unreliable application.

THE COURT: All right. But you're not arguing that the reference to, thing, doesn't mean anything. You mean you think it means an ounce?

MR. HARVEY: Right. Where again, Your Honor, the chart references the difference between -- so when it says 388 grams are in question...

THE COURT: You think it should be 112 grams.

MR. HARVEY: Right.

THE COURT: Okay.

MR. HARVEY: So again, his position -- and again, I know Mr. Dunlap would want me to ask the Court, remind the Court there was a preamble in his sentencing objection that this argument doesn't waive his prior objections and he's preserving all of the issues that were raised with regard to the trial, and so I just want Mr. Dunlap to understand that this proceeding here is to ensure that he has the fullest and fairest sentencing hearing possible and that's what we're doing.

THE COURT: Okay.

MR. HARVEY: Thank you, Your Honor.

THE COURT: All right. Now, I'm going to hear from Ms. Taylor on this first, but before I do that, let me ask you, let's assume that I accept your argument that the word, thing, refers to 1 ounce. So have I got to go through this table and subtract out the excess between the weight in question and then the gram, the number that's--

MR. HARVEY: I have done that already, Your Honor.

THE COURT: Okay. All right. Good, because maybe your math is better than mine.

MR. HARVEY: Well, my math isn't so hot, but...

THE COURT: Okay.

MR. HARVEY: I'm -- thank you for the compliment, but be sure you think about it before--

THE COURT: What would the cocaine weight be if I accepted your argument?

MR. HARVEY: 1116.8 grams.

THE COURT: I'm sorry. Say that again.

MR. HARVEY: 1116.8.

THE COURT: Okay. All right. Thank you. All right.

Ms. Taylor, why do I need to not worry about that?

MS. TAYLOR: Your Honor, as you recall, Agent Greenan testified at trial, and this was -- he testified about the wire calls and his and other agents' methodology

for determining what the nature of the calls were and testified about codes and such and, yes, we agree the law is that you should be applying methodology consistently.

That does not mean that the word, thing, has to be applied consistently. It has to be applied in context.

THE COURT: In context with the previous and the following--

MS. TAYLOR: Following calls, but also who the players are that we're talking about on the calls. And in this case that one call that he referred to was a discussion between Mr. Smith and Mr. Dunlap talking about the guy coming, the man coming. I don't remember the use, but that was the supplier coming. Kevin Mullins, if you will recall, was the one who would deliver on behalf of Pernell to Mr. Smith.

So when we're talking about the deliveries made by Mr. Pernell, we're talking about -- or Mr. Mullins, we're talking about a larger quantity. When we're talking about drugs that are picked up by Mr. Stacey Fuller from Mr. Dunlap to deliver to a customer, a thing is a smaller amount.

So, a thing may be a kilo in the context. A thing down here may be a cookie, an ounce of crack. If we went down further, a thing may be a gram. A thing is just a word that's used in the context. It does not have a meaning in and of itself.

And they derive their drug weights going through, conservatively, through the wire calls, the ones preceding, the ones that are following, they looked at the cooperating statements of the various witnesses involved, those that were doing the big drug weights, those that were doing the smaller drug weights down here, and so we do believe and we think that the testimony and the fact that the jury found them guilty based on Mr. Greenan's testimony and on those wire calls shows that the methodology was applied fairly and consistently and that you can't pick apart one word and say, if it means an ounce here, it means an ounce there.

THE COURT: Right. So your argument is that, thing, has a different meaning depending on who the conversation is occurring between and also the context of the call itself.

MS. TAYLOR: Correct.

THE COURT: Okay. I understand. All right. Anything in reply?

MR. HARVEY: Your Honor, again, conversation 7335 is utilized in the presentence report solely, there's no reference. Ms. Taylor's response talked about context, but there's no context in the presentence report.

I cited -- so, we're not saying it's just -- it's just too indefinite. And when there's uncertainty, I believe I cited some authority if there's uncertainty, that the

application or the Court's determination of the drug weight should be to the benefit of the defendant.

So with the heroin weight, if that was in fact about a transaction, it's speculative who the man was or who the boy was because that's also used in other transaction -- hey, my man's coming -- those are just generic terms. There's no indication that that vernacular indicates with specificity or even a preponderance in the instance of this conversation that that's a kilogram supply.

If let's -- so it is just so vague to be unreliable. And Your Honor, thank you.

THE COURT: Okay. All right. Anything in response to that?

MS. TAYLOR: No, Your Honor.

THE COURT: Okay. All right. I think that based on the testimony that we heard at trial about this and the context of these, these calls, which I agree in and of themselves are very difficult to understand -- we had a lot of different people on different conversations about different drugs and about different quantities, but I think the testimony from folks who are familiar with this language and who have thoroughly reviewed the totality of the calls, paying attention to the parties to the call, the vernacular that is used in reference to and in the context of previous and subsequent calls, I'm convinced that it's more likely

than not that what was referenced is accurate according to the presentence report, so I'm going to overrule the objection.

All right. I'd be happy to hear from you on your next one.

MR. HARVEY: Thank you, Your Honor. And the next objection is the drug quantity inclusion of Fuller drug weight. Your Honor, we had cited with specificity indications from Mr. Fuller's debriefing that highlights what clearly is animosity, ill will, and a bad relationship.

THE COURT: I'm not sure I follow what you're talking about. I'm looking at objection number two about possession of a dangerous weapon.

MR. HARVEY: I apologize, Your Honor. There was still another --

THE COURT: Oh, okay. I'm sorry.

MR. HARVEY: -- drug weight.

THE COURT: Okay. All right.

MR. HARVEY: Your Honor, it's in page five of the sentencing memorandum.

THE COURT: Okay.

MR. HARVEY: So Your Honor, his drug weight--

THE COURT: Fuller drug weight, okay.

MR. HARVEY: Because Mr. Fuller's drug weight -- Mr. Fuller's drug weight places his -- his base offense level

is 32. Mr. Fuller's drug weight as crack cocaine gets -- without anything else, he's still at that base level.

So, Mr. Fuller testified at the trial. Mr. Fuller talked about getting circles from Mr. Dunlap. Mr. Fuller's debriefing is cited in the presentence report as the basis of the crack cocaine weight that was utilized in the presentence report.

I had cited with specificity again Fuller -- and they had a relationship of animosity and mistrust. Fuller was aggravated with his interactions with Terrence. That's in the page 06372 of his debriefing. He stated Terrence did not like him. He expressed his belief that Terrence was sneaky. He further stated another individual believed that Terrence was sneaking or stealing drugs.

The proffer interview demonstrates his aggravation with Terrence, and their acrimonious and hostile relationship undermines the reliability of the information he provided to government agents. So, many of the statements are speculative and not founded on precise information. Any information provided by Fuller must be viewed in light of his bias against Terrence, which underlies the reliability of his information.

So, you know, we have trial testimony, we have a trial verdict, and then we have the cocaine weight utilized in the presentence report based on Fuller's proffer, which he did

not elaborate at trial.

So we have this dilemma of a witness providing evidence about some drug weight, but we have got this just large amount of cocaine, which when it's converted under the guidelines -- and at the appropriate time I'll talk about the one-to-one argument -- but it transforms his base offense level to level 32 where if this amount were reduced or comport with the trial testimony and utilizing a one-to-one, it would lay a basis for a reduced offense level of three -- of 30.

And again, Mr. Fuller's statement must be viewed with his stated acrimony toward Mr. Dunlap, so we believe this information is not 100 percent reliable. Again, I'm Terrence's advocate. I'm aware of what the trial testimony was, so I want to balance my advocacy with the trial testimony and I want to make sure that the Court understands that Mr. Dunlap is not taking the position frivolously that, no, there wasn't any mention of crack at the trial, but the amount that we're using here is unreliable.

And if the amount were reduced based upon its unreliability or referenced the trial amount, which was circles, and circles certainly doesn't mean kilograms, circles is a much lesser amount, then that -- the crack weight should be reduced by the plural of -- to what the plural of circles is. Thank you, Your Honor.

THE COURT: Thank you. All right. Ms. Taylor?

MS. TAYLOR: Thank you, Your Honor. If you'll recall Mr. Fuller, he's the individual who was an older gentleman, was admittedly a crack head, someone who is addicted to crack cocaine. But he became involved with Mr. Santerrio Smith in order to supply his habit, and he did errands for Mr. Smith basically.

He did some work around the house for him and, more importantly relevant to this, he picked up drugs and delivered drugs on behalf of Mr. Smith and in exchange, Mr. Smith, would provide him with small quantities of crack cocaine for his own use.

Mr. Fuller testified at this trial. I believe that the jury found him credible. There was no mention at trial that I recall whatsoever about any acrimony -- and I believe that word is a word that Mr. Harvey is using which is much stronger than anything that Mr. Fuller would have conveyed to agents.

I don't recall any evidence whatsoever that it was any acrimony between the two. Mr. Fuller testified that he would go to Mr. Dunlap's residence at the behest of Mr. Smith, he would pick up crack cocaine in circles -- circles, we believe in a context of this case, would be an ounce, a cookie of crack would be an ounce -- he would pick up the crack and he would deliver it on behalf of Mr. Smith.

On occasion, one or two occasions I believe he testified that he actually picked up cocaine powder. He did not know why he was picking up powder, but he believed that perhaps the quality -- that Santerrio had run out and needed some cocaine on-hand instead of the crack. But Mr. Dunlap's role was to cook the cocaine into crack in large part and to store the cocaine for Mr. Smith.

So, Mr. Fuller's testimony was he went on numerous occasions -- I don't recall exactly what he testified to, but he would pick up quantities most times of crack cocaine on behalf of Mr. Santerrio Smith.

Now, he testified that on at least one, maybe two occasions, he was actually present when Mr. Dunlap cooked the cocaine into crack cocaine, and he told agents that he actually played with Mr. Dunlap's child while the crack was being cooked. So, no evidence that I see of any acrimony. But nevertheless, he did testify. He had an opportunity to be cross-examined by five lawyers. And at the end of it, the jury found him credible.

So, I just don't believe that there's any reason to reduce the drug weights that Mr. Fuller testified to. If you'll recall, because he was a user and not a dealer, he told us and he told the jury he didn't know a lot about weights, he didn't deal in ounces and kilos and what have you, but he knew circles because he was a crack user, and he

knew that that's what he was picking up were circles of crack.

And I don't remember now the exact testimony, but he estimated the occasions on which he picked up the crack, he estimated the number of circles that he picked up, and he talked about the number of circles that he saw Mr. Dunlap cooking. So we don't believe there's any reason to discount his testimony based on Mr. Dunlap's objection.

THE COURT: All right. Anything else on this?

MR. HARVEY: Again, Your Honor, you have someone who is an admitted crack addict whose recollection would be based -- it would be a retrospective on what he recalled seeing and doing while he was in the throws of his addiction.

The statements cited in the objection come from Mr. Fuller's characterization of Mr. Dunlap. So again, Your Honor, we have a personal bias, we have the extra layer of a crack addict, and we have him saying, I don't know about amounts but I know about circles. And again, what we have got is we've got this extrapolation of Fuller's drug weight.

So, if Fuller's drug weight is based on circles, it seems that an addict who doesn't know about weight and his testimony doesn't provide a reliable basis for the conclusion of the amount of crack weight that is in the presentence report. Thank you, Your Honor.

THE COURT: All right. Thank you.

MS. TAYLOR: I would add just one thing, Your Honor. So, we don't have to accept Mr. Fuller's testimony on its face alone because the reason Mr. Fuller was indicted was because of the evidence we had before Mr. Fuller's cooperation.

So what I'm saying is we had calls in which we heard conversations between Mr. Smith and Mr. Dunlap, conversations between Mr. Smith and Mr. Fuller. So we were able to deduce those drug weights based on those wire calls. And then what Mr. Fuller later told us was consistent with what we were hearing on the calls. So we weren't just accepting it whole cloth.

THE COURT: All right. Well, that's a very good point. And for all the reasons that the government has stated, I'm going to also overrule that objection. All right -- or that portion of the first objection as it relates to Mr. Fuller's statements being the basis for some of the drug weights.

All right. Now I'll be happy to hear from you on the possession of a dangerous weapon.

MR. HARVEY: Yes, Your Honor. So that starts on page six of the sentencing memorandum.

THE COURT: Yes.

MR. HARVEY: In essence, you heard about the unreliability arguments of Mr. Fuller. And we have -- and

this is a very unique firearm situation. Fuller saw Dunlap with a Glock one time in April or May of 2017. Dunlap had the pistol stored in the door of his BMW. This was at Santerrio's house on Bronx road. Someone asked for Dunlap to move his car, so Dunlap told Fuller to move it, gave Fuller the key. Fuller got in the car and saw a pistol in a door pocket.

Now, how Fuller knows that Dunlap was the only occupant of the car that day isn't fully articulated. And he arrived at Santerrio's house and he says that Dunlap allegedly came there to pay Santerrio money or get more drugs, but he doesn't say that. So, he doesn't say he observed that. Okay? He just says Dunlap had come.

So, no other witness observed Terrence with a weapon during, you know, in the investigation. As I recall, there wasn't any trial testimony about this because Fuller wasn't asked about the gun at trial.

So when we want to -- if you take the government's argument about trial and about evidence that was presented and being able to have as it -- I guess the gist of its argument was independently corroborate certain information, the trial would have provided the opportunity to independently corroborate this.

We have no trial testimony about the firearm. We have--

THE COURT: I mean, but we -- I mean, we sentence

people and enhance sentences on information that's not at trial every day.

MR. HARVEY: I understand, Your Honor. But--

THE COURT: I mean, you know, it's like saying that, well, you didn't ask about it at trial, so he wasn't subjected to cross-examination on that so it shouldn't be considered? I mean...

MR. HARVEY: No, I think it's a factor to consider. I think when we look at all the issues related to this particular enhancement, it's a factor to consider. Terrence is in the house. Fuller in his statement doesn't provide anything specific with what's going on in the house. You just have this generic Terrence-was-there type of statement. Nothing in particular.

Doesn't say that Terrence had access to the gun when he was in the house. As I cited on page eight, you know, if Terrence -- it would be different scenario if Terrence had carried the gun into the house where activity was allegedly taking place. That it was in storage in a location where Terrence could not access if needed in conjunction with the drug-related activity with the alleged-drug related activity being conducted inside negates any inference that it was present or possessed in conjunction with the drug trafficking offense. Because it was inaccessible, it's clearly improbable the weapon was connected to the offense.

Your Honor, I cited other cases where there have been findings by courts that factually the relationship and the presence of the firearm or the dominion and control of the firearm or you have knowledge or somebody could provide to the Court an indication that Terrence knew the firearm was there, had dominion and control of the firearm. We don't know where the firearm was in the car.

THE COURT: I thought it was in the--

MR. HARVEY: In a compartment. It says in a door compartment.

THE COURT: Door pocket.

MR. HARVEY: It doesn't say what car he was driving, what type of car he was driving, four doors, two doors. It's a lot, it's a lot of speculative information to utilize to rely upon connecting a firearm with this transaction.

The other cases that I cited have more definitive factual scenarios. I'm not saying that this -- an enhancement of the -- excuse me -- a specific offense characteristic of this type hasn't been applied in the appropriate factual circumstance, but this factual circumstance, this one instance of Stacey Fuller speculating -- because the government can't tell you where the gun was in the car, what type of car, what Terrence told Stacey Fuller.

Stacey Fuller -- and Stacey Fuller, again, he's got some speculative statement because he says it could have happened in one month or the other, it happened on an occasion, but there isn't enough specificity with that occasion and the relationship of that occasion and Terrence with the firearm to make it reliable.

So, I had -- statement, it doesn't reveal the precise location of the door compartment with the individual. How does Stacey Fuller know Dunlap was the only person in the car that day? That's speculative. And his limited observations don't establish he had dominion and control over the firearm or even had knowledge of its presence in the door compartment.

We don't know. It's found in a door compartment. That doesn't necessarily mean he was aware of it, he had seen it, he had placed it there. And so--

THE COURT: But it's his car. I mean, isn't that a -- I mean, that's enough. I mean, if there were a gun in my car, I'd know about it.

MR. HARVEY: Well, Your Honor, respectfully, obviously I disagree in this instance. It's not enough. And if we have two -- we have got two alternatives that demonstrate the purpose of the visit was unknown to Fuller. So, the information which the firearm enhancement is not based upon sufficiently reliable information to establish the

specific offense characteristics.

Again, it's a unusual factual circumstance. I have cited factual circumstances that are different and I cited the McCalister case, which we are all familiar with, Your Honor. So in this particular instance, this enhancement certainly has a different factual context.

And the legal analysis applied to this context that's cited in the sentencing memorandum supports the position that this specific offense characteristic isn't supported by sufficient reliable evidence because of these questions in the legal authority that I cited to uphold this two-level specific offense characteristic. Thank you, Your Honor.

THE COURT: All right. Thank you. All right. Ms. Taylor?

MS. TAYLOR: Your Honor, Mr. Harvey has characterized Mr. Fuller's statement as speculative, but I don't think there was anything speculative about it whatsoever. Mr. Fuller said that Mr. Dunlap was there alone, having driven his BMW, that someone asked Mr. Fuller to move the car.

Mr. Fuller got in the car and saw in plain view clearly in the door pocket -- this was not a locked compartment. He didn't say compartment, he said door pocket. And I think we all know when we refer to a door pocket, we're talking about just that. There's a pocket inside the driver's side door

where you can see what's sitting in there.

He didn't rummage around to find it. He said he got into the car to move the car and he saw the gun in the door pocket. And he did talk about why he came. He might not have recalled whether it was to deliver drugs or to pick up drugs, but he did say it was either to deliver drugs or pick up drugs. He didn't say for some unknown reason that it could have been. He said it was one of these two things.

And we know from the wire calls that Mr. Dunlap and Mr. Smith had daily contact about drugs. We know from the wire calls that he went to Santerrio Smith's house to get drugs, to pick up drugs. We know -- we know that -- we know they have a relationship, a family relationship. But during this, this was only a six-month time period that Mr. Fuller was even involved with Mr. Smith and therefore involved with Mr. Dunlap.

And so, to narrow it down to April or May is like saying the spring or the early summer of 2017 -- I don't know that we need him to give us a specific date, but he gave us facts, unsolicited facts about on this one day, I saw a gun.

Now, if he were going to -- and admittedly, Your Honor, he is the only one that talked to us about Mr. Dunlap having a gun. Perhaps that is because Mr. Dunlap didn't walk around carrying his gun. But Mr. Dunlap went to deal with Mr. Santerrio Smith with a gun in the pocket of his car. And

the case law is clear. Mr. Dunlap is not permitted to carry a gun. He is a felon. And the case law is clear that guns are known to be tools of the drug trade.

So, based on the guideline enhancement which says that you should apply the enhancement unless it is clearly improbable that the gun was possessed in furtherance of the drugs, I think -- I think that we have more than met our standard of a preponderance of the evidence.

THE COURT: All right. Okay.

MR. HARVEY: Excuse me, Your Honor. If I may. Need to correct one thing that you'll hear about. His criminal history comprises of two simple marijuana convictions.

MS. TAYLOR: I may have misspoken, Your Honor.

MR. HARVEY: So, he's not -- he wasn't charged with being a felon in possession. Don't want to mischaracterize or have anything that may cause Mr. Dunlap not to be viewed objectively, so I wanted to correct that statement.

MS. TAYLOR: I apologize, Your Honor. My recollection was he was a felon, but it is clear that he is not based on the presentence report.

THE COURT: Okay. Well, so since that doesn't make any difference for my decision on this, but that's noted for the record.

MR. HARVEY: And again, Your Honor, we have this

one -- we have already addressed Stacey Fuller and the issues of who he is and his reliability and issues of that. We also have addressed the factual circumstance.

And again, this particular enhancement is based upon -- Ms. Taylor doesn't like my use of the word speculative, but if there isn't a reliable underlying basis, the government is asking the Court to utilize assumptions about things to enhance or increase his already significant penalty.

So I would respectfully disagree with my colleague, disagree with any negative connotation there may be with the use of the term speculative because that's what the government is asking the Court to do. Thank you, Your Honor.

THE COURT: All right. Thank you. All right. I think based on what Mr. Fuller explained about the presence of the gun in Mr. Dunlap's car, particularly in light of the fact that the relationships between Mr. Smith and Mr. Dunlap and Mr. Fuller are pretty clearly established in those wire calls that were recorded, I would be really -- I mean, it's certainly not clearly improbable that that gun was somehow related to the drug trafficking business that they were engaged in, so for those reasons I'm going to overrule that objection.

Okay. All right. Let's see. All right.

MR. HARVEY: Your Honor, the next objection is maintaining a premises. I would just -- I would rely on the

argument that I submitted in the memorandum with respect to maintaining a premises. I don't think any oral argument would supplement --

THE COURT: Okay.

MR. HARVEY: -- that. I want Mr. Dunlap to understand that I presented and articulated the basis for that objection. And I'll be happy to answer any questions, but I believe that has thoroughly set out the basis for the maintaining the premises objection.

THE COURT: Yes. I mean, I think I understand your argument.

Now Ms. Taylor, do you -- since I haven't gotten anything from the government on this, would you like to respond to that?

MS. TAYLOR: Just, Your Honor, I think that the facts are all contained within the presentence report, but they were also at trial, that Mr. Stacey Fuller went on a regular basis to Mr. Dunlap's home to pick up drugs, that Mr. Dunlap both cooked from cocaine into crack for Santerrio Smith and stored for Santerrio Smith. And in addition to -- and the wire calls obviously corroborated all of that.

In addition to Mr. Fuller's testimony, you had Mr. Elijah Davis' testimony that prior to Mr. Dunlap being the person who maintained the stash, basically, that Mr. Dunlap had kept -- I mean Mr. Elijah Davis -- sorry about

that -- Mr. Elijah Davis was responsible for working for Mr. Santerrio Smith and holding his drugs and keeping his drugs for him, but that Mr. Davis was arrested and placed on location monitoring, and so it was no longer safe for him to be delivering drugs to and from, and so at that point the stash basically shifted to Mr. Dunlap.

Trying to remember if there's anything else. Is that it? So I think -- and clearly the calls throughout the wire clearly indicate that Mr. Fuller was picking up drugs from Mr. Dunlap, that he watched -- he testified that he watched him cook crack at the house.

And clearly the law is not that the house has to be maintained for the sole purpose of storing drugs or cooking drugs but that it has to be one of the primary purposes. And we think at least during this time period after Mr. Davis was placed on location monitoring, that he was in fact maintaining a house for the purposes of manufacturing the crack and storing the cocaine and crack.

THE COURT: Thank you. Mr. Harvey?

MR. HARVEY: I'd just reiterate the argument and the legal theory presented. We think that the legal theory presented with respect to the premises argument is persuasive and that in spite of Ms. Taylor's articulation, the Court should consider what we argued and not -- and sustain the objection to that specific offense characteristic. Thank

you.

THE COURT: All right. Well, I think it's pretty clear that this was a stash house, so I'm going to overrule that objection.

All right. Now, let's see. What do we have? You withdrew I think one of them.

MR. HARVEY: Your Honor, there was an obstruction of justice, a specific offense --

THE COURT: Okay, and then--

MR. HARVEY: -- characteristic that in view of what happened in the companion case, 19-781, it was withdrawn.

THE COURT: I'm sorry, I didn't hear--

MR. HARVEY: In view of the guilty plea in the companion case, the objection to obstruction of justice specific offense--

THE COURT: Okay. That's the one you withdrew. Okay.

MR. HARVEY: Right.

THE COURT: All right. So what does that leave here for the -- as far as your objections go?

MR. HARVEY: Your Honor, that's the gist of the objections. I do have -- I guess after the Court reaches -- I don't know if the Court wants to go into the downward departure motion or...

THE COURT: Yeah. Okay. I believe if I have

addressed all of the objections, then probably now I need to hear from the government about -- first I need to announce what the --

MR. HARVEY: Correct, Your Honor.

THE COURT: -- the report says. All right.

Mr. Mills has objections? I'm sorry. I didn't realize we were having -- okay. I'm sorry. Okay.

MR. MILLS: That's okay, Your Honor. I...

THE COURT: You had an objection for an adjustment for acceptance of responsibility?

MR. MILLS: Correct.

THE COURT: Okay.

MR. MILLS: Your Honor, and of course, just place this in context for the record, this was a jury tampering charge to which he pled guilty. There was a plea agreement done at the time that he entered this, and at the time it was understanding that he would be accepting responsibility for that claim, and of course, that has resulted in him withdrawing his objection to that claim in his companion case that is represented by Mr. Harvey.

Your Honor, just in looking at this case -- the way I tried to talk about it is like two separate silos that I'm representing on one charge and Mr. Harvey is representing on another, but for sentencing purposes those silos are kind of getting merged.

THE COURT: Yes.

MR. MILLS: It's not, quote, concurrent sentencing because you're -- they are -- and that's one of the dilemmas I'm going to have with the Court is I can make an argument and want to make an argument about why he deserves less than a guideline sentence or what the PSR recommends here, but since it's tied to the other case, in other words, it's always got to be six levels lower than that offense, kind of my starting point is going to be what you're going to do with Mr. Harvey's case setting that offense level.

But let me address just the specific objection at this point if I could, please. And let me also indicate that my understanding is Mr. Dunlap is going to be appealing his conviction on a direct appeal in the trial. If that is reversed on appeal, then whatever happens here, I think he'll have to be resentenced on this jury tampering charge because it is -- the guideline is set in relationship to that conviction.

If that conviction is gone, he does not have a cross-reference that takes him up into the 30s. He would be down around a -- I think his base offense level is 17 or his base level offense 14, three because happened during the course of a criminal trial. So regardless, and so if that's reversed, he would have to come back and be sentenced.

Dealing with it as it is today, he has a guideline

sentence of 30. And of course, he did accept responsibility. It's consistent with what he did, withdrawing his objection in that case. I understand the probation's position that he has to accept it on all, but there's nothing more he can accept in the case that I represent him on. And I think that should be considered in establishing his calculation under that sentence.

And under those circumstances I think he should get a three-level deduction and should be at an offense level of -- excuse me -- of 27 as opposed to 30 as a starting point. I have other arguments that may go to variances, but I just want to keep this argument focused on the objection.

THE COURT: So basically you're arguing that this is one of those extraordinary cases where I should allow acceptance of responsibility.

MR. MILLS: I have been practicing for 35 years. It's the first one I have ever dealt with like this. So, it's extraordinary to me and it does seem unique. And I think it's important also that he did accept responsibility on this serious issue and does deserve credit even if it may not ultimately make a difference in his long-term sentence, on this sentence that he did, making a decision for the Court, avoiding a jury trial, avoiding putting the government to the proof, and should get credit for that.

THE COURT: All right. Thank you.

MR. MILLS: Thank you.

THE COURT: All right. Ms. Taylor?

MS. TAYLOR: Your Honor, as first matter, the Court is not required to rule on objections that do not affect the sentencing calculation. We do acknowledge that Mr. Dunlap ultimately accepted responsibility on this charge by pleading guilty. And if in the event that his other conviction is overturned, he will be back before this Court --

THE COURT: Will be back here. Right.

MS. TAYLOR: -- and whether or not acceptance applies at that time will be decided at that time.

THE COURT: All right. I agree with the government. I don't think at this point a decision needs to be made on that. If the conviction on the drug trafficking charges are reversed and we are sent back here to resentence, then you'll be free to argue whatever you want to argue about it at that time.

All right. So, that brings us now to me adopting the findings because I believe now I've resolved all of the objections to the report. So I will adopt the findings that are set forth in the presentence investigation report including the applicable statutory and guideline provisions that are set forth in it for purposes of determining the reasonableness of my sentence.

And I -- this is something that I'm having to add into

these things because, well, everything I do because of what the Fourth Circuit has told me I have to do.

But I want to ask the lawyers if they have been over the mandatory and standard conditions of supervision that are outlined in the report with Mr. Dunlap.

(Mr. Harvey conferring with client.)

MR. HARVEY: Your Honor, I have met with Mr. Dunlap several times. Mr. Dunlap has had the opportunity to review his presentence report in its entirety. I have questioned him repeatedly, has he gone over the report in its entirety. His answers have been to the affirmative. He is aware of all the content.

And we also talked about the fact that he would be on supervised release, and I explained to him that the presentence report contained what would be -- what the conditions of pre -- excuse me -- not pretrial release, but supervised release. I was being optimistic about him coming back to see you.

So, Your Honor, again, Mr. Dunlap, based on our conversations, is aware of the terms of his supervised release.

THE COURT: Okay. Mr. Dunlap, I just want to make sure because just like with the rest of the PSR, if you want to lodge an objection about it, you would have to do that now.

THE DEFENDANT: Yes, ma'am. I understand all the terms.

THE COURT: What did you say?

THE DEFENDANT: Yes, ma'am, I understand all the terms.

THE COURT: Okay. All right. Thank you. Well then, counsel having affirmed, responded affirmatively, I'm going to incorporate that also into any sentence that will be imposed.

All right. Mr. Dunlap, sir, if you'd stand, please. All right. The statutory provisions for your offenses are as follows: First, your first offense is Count One, which is conspiracy to possess with intent to distribute and to distribute 5 kilograms or more of cocaine and 100 milligrams or more of heroin.

Your second offense, Count 22, is use of a communications facility in furtherance of a drug trafficking crime. And your third is set forth in Count 49, which is possession with intent to distribute and to distribute a quantity of crack cocaine.

Now, for Count One -- is there something you wanted to -- sorry. It was Count One. Your second offense was Count 21. I am not sure what I said, but it's Count 21.

All right. Now, as far as what the punishments are for those offenses, for Count One, the statutes impose a sentence

of 10 years to life. For Count 21, it's not more than four years. And Count 49, it's not more than 20 years.

As far as the supervised release that would follow a sentence for these offenses: For Count One, it's a period of at least five years; for Count 21, it is not more than one year; and for Count 49, it is at least three years. Probation is precluded by the statute.

Count One carries a fine of $10 million. Count 21, a fine of $250,000. And Count 49, a fine of $1 million. And then there is a special assessment fee for each count of a hundred dollars, so it would be for a total of $300.

Now, as to the jury tampering charge that's set forth in Count One of the 3:19-781 case, the statutes provide for jury tampering, custody of not more than 20 years.

Mr. Mills, did you have something that you wanted--

MR. MILLS: No, Your Honor. I'm sorry. I just...

THE COURT: Okay. Not more than 20 years, followed by supervised release of not more than three years. It is ineligible also for probation.

The jury tampering offense carries a $250,000 fine and a $100 special assessment fee.

So, those are the statutory provisions for your offenses that are applicable.

Now, the advisory sentencing guidelines assign to Count One that -- let's see. Not sure if these -- Okay. All

right. I'm sorry. Okay. The advisory sentencing guidelines combine Count 41 and Count 49 and assign them a base offense level of 32. And as you heard, there was a increase because of a specific offense characteristics, that was your possession of a dangerous weapon that increases that 32 by two levels.

As you also heard, there is an additional two-level increase because you maintained a stash house.

There is a final increase because of your adjustment -- I mean, excuse me -- for your obstruction, which was willfully obstructing or impeding or attempting to obstruct or impede the administration of justice. So your total offense level for that count, those counts is 36.

Now for Count 21, the guidelines assign that offense a base offense level of 36. Again, that is increased two levels for obstructing justice, so the adjusted offense level for that count is 38.

PROBATION AGENT: Make a correction. The adjusted offense level for Counts One and 49 is I believe you said 36. I believe it's 38. Want to make sure.

THE COURT: Let's see. I have Count One and I have Count 49. And you say it's not 49?

PROBATION AGENT: Sorry, Your Honor. It's Counts One and 49 the adjusted offense level is 38.

THE COURT: Oh, okay. I apologize. Because that

would be 32, 34, 36, so that would leave you with an adjusted offense level of 38.

Now, for Count 21, which is use of a communication facility in furtherance of a drug trafficking crime, the guidelines assign that an offense level, base offense level of 36. Again there's a two-level increase for obstruction of justice, so there's an adjusted offense level for Count 22 of 38. Excuse me -- 21 of 38.

Now, let's see. For the jury tampering case, the Count One, the single count, the guidelines assign that a base offense level of 14. That number is increased three levels because of your interference with obstruction of justice. There is a cross-reference with the others that makes the offense level 30, and that along with the other that I just read combined for an offense level of 38 because it's the higher one. So you have a total offense level on the jury tampering for 38.

Now, your criminal history category has been determined to be a two. In that situation, the guidelines yield an imprisonment range of 262 to 327 months followed by supervised release for a period of five years for Count One, one year for Count 21, and three years for Count 49.

Okay. For the second case, 3:19-781, the supervised release period is one to three years. Probation is precluded by statute. We have not calculated a fine, but there's a

total of four counts with a hundred-dollar special assessment fee, so that would be $400. All right.

Sorry that was a little confusing, but that's how I see the applicable statutory and guideline provisions here.

Are there any comments or corrections?

MS. TAYLOR: Not by the government, Your Honor.

MR. HARVEY: No, Your Honor. Just so Mr. Dunlap and his family understands, procedure at this point is the Court has announced the calculations --

THE COURT: That's right.

MR. HARVEY: -- of the guidelines after taking in consideration and ruling on the objections.

THE COURT: Correct.

MR. HARVEY: So the Court's calculation of the offense level is correct considering it's not sustaining the objections.

THE COURT: Right.

MR. HARVEY: So I just wanted Mr. Dunlap to understand where we are in the proceeding. Thank you, Your Honor.

THE COURT: Okay. And it is a little confusing. The presentence report, we've dealt with the objections. And given the way I ruled on the objections, we have to calculate the guidelines, and I -- that's what I was doing. I was calculating the guidelines and I was just -- I believe they

are correct, and so we haven't had any objections to that and there couldn't be because that's what the guidelines -- the guidelines provide. It's simply just like when I stated what the statutes provide, that's what they provide.

Now, we'll get to another phase of this in a moment where we will discuss whether or not the guidelines calculation or the ranges there are appropriate. Okay? So that's the next part of this sentencing, and we'll get to that in just a moment.

All right. So you can be seated.

All right. We have -- Mr. Mills, you didn't have anything you wanted to -- I noticed you were standing a moment ago and I just want to make sure I wasn't cutting you off. Okay?

MR. MILLS: No, I'm fine, Your Honor.

THE COURT: All right. Well, we have those calculations, we know what the statutory parameters are. Let me hear from the government. I know the government has seen Mr. Harvey's filing. Would you like to go first?

MR. HARVEY: Your Honor, we're at the phase where now the Court must consider his downward departure motion based on criminal history.

THE COURT: Right.

MR. HARVEY: So...

THE COURT: Okay.

MR. HARVEY: If Your Honor please, I would again incorporate by reference the argument presented in the sentencing memorandum.

So, we have Terrence Dunlap whose criminal history is category two based upon two simple possession of marijuana convictions. If we look at the purpose of the guidelines, and the guidelines, the -- the guidelines came about in order to assure uniformity in sentencing and to make sure that there wasn't a disparity amongst defendants based upon many factors, one is which -- one of which is criminal history.

So the guidelines in chapter four talk about a specific basis for a departure if we have an over-represented criminal history. So we have someone who has two simple possession of marijuana convictions.

As I cited in the sentencing memorandum, had Mr. Dunlap been a resident of California, these wouldn't have counted. I know he's not a resident of California, but when we look at the purpose of the guidelines, when we look at the goal to have a uniform treatment of offenders, the simple possession of marijuana convictions elevate his criminal history by a category. Were he in another location, those wouldn't be counted.

So it seems that -- and also this kind of ties in to where we'll go with the sentencing factors, but the probation office did a very thorough presentence report and it

indicated in its interview with Terrence, Terrence had a substance abuse issue. He was addicted to marijuana. So we have these offenses that clearly are related to, you know, an issue that Terrence was afflicted with.

When we look at -- when we look at the nature of the sentences, there were sentences, and no one challenged the validity of the conviction. And I acknowledge the convictions are there, but they are very minor in nature.

So, in 2022, given the flux of the perspective on marijuana laws and what to do about marijuana, which is in a national debate -- and I'm not articulating or taking a position on the wisdom of a particular law, but I do think it's fair that I counsel the Court on behalf of Terrence in this instance.

These two simple possession of marijuana convictions overstate his criminal history. And if Your Honor were to vary or grant a downward departure to criminal history category one, it provides some relief for Terrence because, Your Honor, I have a sentencing table here in --

THE COURT: There we go, 235 to 293.

MR. HARVEY: -- 235 to 293, which is significant. And Your Honor, again, the guidelines call for this. Now, it's kind of funny you have a lawyer arguing in front of you what the guidelines call for and then later on I'm going to say the guidelines are advisory, but Your Honor, I -- and I'm

not trying to be--

THE COURT: Consistency is no problem. No problem.

MR. HARVEY: I just -- that was just an editorial comment. But I believe in this instance, the guidelines sometimes impart wisdom to us. Not always, but in this instance the guidelines, when they were formulated, particularly recognized a circumstance like this. And to treat him as a category one offender, I think when Your Honor looks at all the purposes and all the competing interest in this case, including the government's interest, including the interest of justice, those interests won't be harmed by treating Mr. Dunlap as a category one criminal history offender. Thank you.

MR. MILLS: Your Honor, if I might just add to what Mr. Harvey has said just in joining that request. The reality is that's a two-and-a-half year increase in his sentence based on two minor offenses which at most would carry 60 days under South Carolina law.

So if we really want to translate what those two minor offenses are doing, he's getting two and a half years for it. That's a lot for simple possession of marijuana.

THE COURT: All right. Thank you. All right. Ms. Taylor?

MS. TAYLOR: Your Honor, we do not believe that they've articulated a basis for a departure in this case.

Mr. Dunlap is not being treated any differently than any other individual who has been arrested for two counts of simple possession.

The guidelines provide for a point for these minor offenses, if it's simple possession or shoplifting or what have you. And I think even -- I think these occurred in 2014, if I recall. Even in the great state of California I don't think it was legal to possess marijuana back in 2014. But even so, it was illegal here.

I think that the guidelines provide for a departure when the criminal history does overstate the criminal past of the defendant. And I would use as an example a situation where someone may be a career offender because they have had two prior bar fights, basically two charges, two convictions for assault and battery that could be a bar fight and nothing more, and now their guideline, their criminal history goes from a one or a two to a six, but that's not the case here.

He's only gone from a one to a two. And there's nothing about his convictions that set him apart from any other defendant that's similarly situated.

THE COURT: All right. I agree with the government. There's nothing unusual about this. And it was simple possession of marijuana and that's why it was a single point. So I don't think it's substantially overstating your criminal history, so I'm going to deny the motion for a

downward departure.

All right. So now we -- still we're left with the same guidelines range. So let me hear from the government about what is an appropriate sentence for Mr. Dunlap given all of these things.

MS. TAYLOR: Your Honor, we do clearly believe that a guideline sentence is appropriate in this case. We know that Your Honor has been inclined to give some defendants who have shown remorse for their reactions a slight variance even after trial, but in this case we have a defendant who committed an extraordinarily serious offense to start with and then during the course of his trial on that charge committed what I think is one of the most serious offenses I have ever prosecuted.

THE COURT: I agree.

MS. TAYLOR: And so I just can't imagine that this is a defendant who is entitled to a sentence below the guideline range in this case. So we would just -- based on all the factors under 3553, we would ask for a sentence in the guideline range.

THE COURT: All right. Mr. Harvey? You would like for me to vary down from that range?

MR. HARVEY: Yes, Your Honor.

THE COURT: Tell me why.

MR. HARVEY: Well, Your Honor, let's talk about the

sentencing factors as they apply to Mr. Dunlap. One is Mr. Dunlap's age. He's a young man. I cited in the presentence report he's got a close relationship with his family. He's also a father. He also -- he has maintained stable relationship with the mother of his child. He's -- to the extent he can, he's tried to be involved in his child's life.

As Your Honor knows, over the course of the case, Terrence lost his father. Terrence was unable to bring closure to the loss of his father. And we tried to get him released to be able to participate in a funeral and reach closure with his family in a traditional fashion.

Your Honor, Terrence demonstrated a good work ethic. And I think when Terrence puts this matter behind him in whatever fashion that takes, he's demonstrated good personal characteristics.

Your Honor, and one of the concerns that I know the Court has and that the sentencing factors and the purposes of sentencing look at is deterrence and protection of the public. I cited in the sentencing memorandum that Terrence is a young man who's looking at a sentence that could be for a considerable period of time.

The sentencing commission has found that as people age -- and if Your Honor sentences him within the guideline range, he will have aged substantially. And if Your Honor sentences him and varies from the guideline range to a

sentence that may comport with co-defendants who went to trial or other co-defendants who are similarly situated, it will still be a substantial sentence.

Also, Your Honor, the commission has found on the issue of deterrence and protecting the public that recidivism decreases with sentences over 120 months. So we have a statutory mandatory minimum of at least 120 months in a case, so we have Mr. Dunlap, even if the case was -- excuse me -- if the sentence was varied to the statutory minimum, the guideline has found that if you vary to that minimum, that sentence correlates with decreased recidivism. That's the sentencing guidelines.

Your Honor, again, you heard the argument about criminal history. Your Honor, he has got -- the simple possession of marijuana convictions accelerate his sentence substantially to category two. Those two simple possession offenses substantially we contend and still contend you can look at in the context of sentencing factors overstate his criminal history and that overstated criminal history which arose from the characteristic of him having substance abuse issues because he was candid with the presentence report.

And in the presentence report he talked about his marijuana addiction. So we have a young man who has a substance abuse issue, which isn't the sole cause but is a contributing cause and a factor for you to consider, not only

contributed to what we contend to be an overstated criminal history but also contributed to the underlying conduct.

I believe a salient issue is sentence disparity amongst co-defendants. Okay. But what we know, the presentence report clearly indicated that Terrence was an underling. And I set out on page 18 of the memorandum and referred to the portions of the presentence report that talked about Terrence being an underling for Santerrio Smith.

And his position, we didn't seek a minor role departure, we didn't come before the Court seeking those kind of departures because sometimes clients don't understand why lawyers do things, but in this instance we need to focus on what is there and what is sustainable. And so, no one is saying Terrence played a minor role, but it's clear in this instance Terrence was an underling and he was an underling to the Smiths.

And we have also, when we look at equally-culpable co-defendants, he didn't share in a larger fruit of the crime. When we look at what was forfeited in what co-defendants who forfeited a lot more money, a lot more fruits of the crime, their sentences were different.

And when we -- we cited Donald Robinson. He had cash, firearms, expensive jewelry. He got 180 months. James Green, who had $28,000, a substantial amount, substantial amount -- I don't know if his presentence report extrapolated

that cash amount to what drugs were, but I imagine it's a substantial amount. He got 937 days.

So Terrence goes to trial. He exercises his right to trial. Do not believe Terrence should be treated unfairly for him exercising his right to trial. And we know similarly-situated defendants who are found guilty at Count One, Whitney Pernell got 135 months.

I don't know and I can't recall her criminal history, but it can't be -- if her -- if Terrence's criminal history is two simple possession of marijuana convictions, her criminal history could be equally benign or greater, and she goes to trial, she's an underling to speak of in the context of the case. And Ms. Ford, same argument. She gets 135 months.

Now, Glenn Pernell and Santerrio are distinguishable from Terrence both in role, in conduct, and criminal history. So this case, to avoid a disparity between defendants in the case with similar criminal history and similar conduct, we believe the sentencing factors require a variance.

Also, Your Honor, I had cited the sentence disparity based upon guideline findings. The guidelines -- and I also cited in the memorandum the Supreme Court has recognized the unique role of the sentencing commission and its importance in it gathering data and helping -- both help courts, prosecutors, defense lawyers on what its findings show in

reference to similarly-situated defendants.

So, I ran an information search based upon criminal history two defendants who have been convicted of cocaine, heroin, and crack drug trafficking offenses. So we have similarly-situated defendants in a broad universe and similarly-situated defendants in the -- in his case.

In the broad universe, I cited what the average sentences were, and that was just an indication to the Court what the average sentences were, but I'm not asking Your Honor to vary to the average sentence because you can't. He's got a statutory mandatory minimum. But I wanted Your Honor to see the universe of sentences for similarly-situated defendants.

The last chart was the sentencing commission's information for similarly-situated defendants, what percentage were sentenced within the guidelines, what percentage received a non-government variance motion.

And the methodology I applied, I took the average of the last three years, and it shows that non-guideline sentences -- or excuse me -- within-guideline sentences occur, but they don't occur over half the time. Almost a quarter of the time for the past three years for similarly-situated defendants as Mr. Dunlap, non-government variance motions have been granted.

So what that says to me in my interpretation of that is

for Your Honor to do a variant sentence in this case isn't an anomaly. Nationwide it's almost 25 percent of the time.

So when we look at sentencing factors, we have got the defendants in the case, we have got the broad universe of all defendants, we have got the length of sentence, we have got the fact that his aggregate sentence includes supervised release, so there's a mechanism to deter him, protect the public, avoid sentencing disparity.

And Your Honor, I would just incorporate by reference his personal characteristics and those other issues.

And another issue is the one-to-one crack variance ratio. Your Honor, we articulated in the sentencing memo the propriety of using a one-to-one crack ratio. We understand that there's been some remedial effort with the one-to-18 ratio, but it still creates a big disparity.

Your Honor, in this instance we also cited a recent congressional action that's pending in front of the senate judiciary committee that recognizes there is a consensus that something needs to be done with regard to the sentencing disparity. So if we utilize the one-to-one ratio, it may -- it would impact his sentence.

So, in essence, Your Honor, we have a sentencing factor argument that I have articulated, we articulated the one-to-one ratio. And Your Honor, when you look at the totality of circumstances that he is a young man with a child

with a minimal criminal history, and he has shown some growth in development since his case ended.

He's accepted responsibility in a subsequent case. Acceptance of responsibility is an indication of commitment to development and change, and I think that's a substantial factor in his behalf as well.

And since the congress has mandated that we impose a sentence that's no greater than necessary when looking at his status in the case, when looking at the broad universe of offenders, looking at offenders in his case, looking at what the commission says about length of sentences and recidivism, and taking into account his personal characteristics, I'm sure that after the Court has given close attention to everything that was presented to it, it will agree with me that the sentencing factors counsel towards a non-government variance sentence -- variant sentence which is substantially less than the guideline sentence. Thank you, Your Honor.

THE COURT: All right. All right. Mr. Harvey has said a lot. Is there anything that you want to respond to?

MS. TAYLOR: Just a few things, Your Honor. So, I do agree that Mr. Dunlap, which is somewhat unusual in my cases, does not have a serious prior record, but that is as far as I can see really the only factor that weighs in favor of a sentence outside the guidelines.

When I look at the presentence report, I look at the

personal history of this defendant and I see a young man who dropped out of high school, and the only -- Mr. Harvey mentioned his work ethic. The only work that is reported in the presentence report began after he was arrested on these charges, if you'll note. And he had three jobs during that time, each for a short period of time, just a matter of months. Less than a year on in each case. So as far as I can see, the most consistent work he ever did was selling drugs. And it's a shame that that's where we are.

I'll also mention to the Judge, to the Court, Your Honor, that you may not be aware that initially we took down this case, we arrested everybody. Mr. Dunlap remained a fugitive for some time. Despite that, he was released on a bond, but the government asked that he be detained and he was not.

Talking about the fact that he is a father, I don't want to second-guess whether or not he is a good father in other respects. But I bring to the Court's attention the fact that he had a young child, a baby, in his home where he was storing drugs and cooking crack cocaine.

THE COURT: I recall that.

MS. TAYLOR: And then finally, Your Honor, the fact -- I can't even touch on it enough the fact that he and his family decided that -- basically an assault on the judicial system in having approached a juror who was sitting

in a trial. It's one of the most egregious crimes that I have ever had to prosecute and I will say the only time I have ever had a case as such in 27 years of federal prosecution, 29 if you count my state prosecution. Never had a case like that.

So, I just can't stress how serious I think that offense is. But it also to me demonstrates his aptitude for recidivism. He's arrested, he's under very serious charges, he's on trial for his life, and yet he commits another very serious offense.

So, we don't think that this is a case that's even a close call for whether a variance, a downward variance applies. This could have, on the other hand, been a case where the government may move for an upward variance. You know, I recognize that Mr. Harvey was treading very lightly and not trying to diminish too much Mr. Dunlap's role in this offense, but I would consider him to have had a vital role in this offense.

Mr. Smith, Mr. Santerrio Smith, was under court supervision and could not deliver drugs and so could not have drugs in his home on a regular basis, and so he employed this man to make certain that his operation continued. So, we'll sit down at that and we would ask that the Court consider a sentence within the guideline range.

THE COURT: Thank you. Mr. Harvey?

MR. HARVEY: Yes. If Your Honor, if I may, just Mr. Dunlap in paragraph 86 of the presentence report worked as a forklift operator for his dad from 2010 to 2018. So the characterization that his only employment was selling drugs is not accurate based upon the presentence report which you have adopted.

Your Honor, with respect to the issue of what happened at the beginning of the case, memory serves me correct, Mr. Dunlap engaged my services and he made a voluntary appearance, so, you know, I think to try and interject that episode of the case in the argument for a basis for sentencing -- once he obtained -- is inappropriate -- he obtained counsel, he voluntarily appeared. So I just think that Your Honor should base her decision on meritorious information that's been presented rather than an episode from early on in the case.

Your Honor, again, you have heard what we have articulated. You're aware how Terrence did accept responsibility for his conduct, which again I believe indicates growth, is something to be considered. And I appreciate the US Attorney's Office recognizing the issue with his criminal history, and I think that's something the Court should strongly consider.

And I don't agree with Ms. Taylor about much in this case, but I do have to give her accolades when it's deserved,

and I think that her -- it's a deserving accolade that she will articulate to the Court that she recognizes the issue with his criminal history and how it does impact the severity of his sentence.

I'll defer to my colleague, Mr. Mills.

THE COURT: Yes. Mr. Mills, did you have something you wanted to add?

MR. MILLS: Well, Your Honor, again, I'm cognizant that there's a drug conviction, but I'm going to argue my silo for a moment --

THE COURT: Okay.

MR. MILLS: -- because I've got a client who is looking at a level 38 which would otherwise be a level 17 but for the drug conviction. Okay?

I know the Court has overruled the objection on the criminal history category, but I think that's a very, very, very important thing recognized by Ms. Taylor, argued by Mr. Harvey, and reiterated by me is that when you're up in this level, even in criminal history one or two, we are talking about a one-level enhancement, like in this instance is about two and a half years. Okay?

So, it's really important that the Court consider that. If I'm looking at a variance for my personal -- like correct -- well, not correct the record, supplement it. Although he did drop out of high school, he did get his GED,

so he did go through with that and it was -- there's completely there -- that characterization.

But the idea that he's going to -- the co-defendants in this case that I have have got plea deals talking about a 12-month sentence. Okay? He's looking at a 20 times that amount, more than 20 times that amount when you are looking at a 262.

Talk about a disparity in sentencing for the similar conduct. So even if you look at his--

THE COURT: I know, but Mr. Dunlap earned that distinction and discrepancy by committing the primary offense for which he was being tried when he committed the second.

MR. MILLS: I understand--

THE COURT: So it's -- we are not talking apples to apples here. So, yeah.

MR. MILLS: But we are talking about that when it gets added on two-level enhancements at that end of the category, it's not like being added on two levels lower down the rung. It's very substantial in that amount, and so I think that's a reason for the Court to variance at least a level or two on that, on the -- off the 38 based on the disparity in the co-defendants' case.

I understand there's a separate basis on that. But when I'm looking at the case that I have, that's a vast disparity difference. And even the adjusted level was a 30, but it

gets bumped up because of the highest level.

So the guidelines completely overrepresent his conduct for this, a serious charge. But you're talking about 262 on this charge, and that just seems improper, Your Honor.

THE COURT: All right. Thank you. All right. I'm going to take a -- unless somebody would like to say anything before I do, I'm going to take a short recess to think about this for a second.

MS. TAYLOR: I just wanted to clarify a couple things. Mr. Harvey is correct. I missed the paragraph that talked about his work for his father as a forklift driver. But I also want to remind the Court or point out to the Court that, yes, he may have retained Mr. Harvey and turned himself in, but we started looking for him and advised his family of the outstanding warrant in September.

He did not turn himself in until November. So, he was a fugitive for approximately two months before appearing before this Court. And the fact that he later retained Mr. Harvey and turned himself in does not --

THE COURT: Right.

MS. TAYLOR: -- counteract the fact that he was running from the police for two months.

THE COURT: Okay. All right. Very good. Let's take about a 10-minute recess and let me think this over for a second. I will be back with my sentence.

(Whereupon, a brief recess was had.)

MR. MILLS: Judge Lewis? Just in the break, Mr. Harvey and I had an opportunity to consult with Mr. Dunlap about his right to allocute to the Court prior to sentencing. He has chosen not to, but did want me to make a quick couple comments to the Court that he wants --

THE COURT: Okay.

MR. MILLS: -- the Court to be aware of before passing judgment. Mainly, again, that--

THE COURT: So Mr. Dunlap, you don't wish to address the Court?

THE DEFENDANT: No, ma'am. I -- no, ma'am. I'd rather have my counsel speak for me.

THE COURT: All right. All right.

THE DEFENDANT: Because I'm up under oath and I don't know, you know, anything I want to say may affect my appeal or anything else.

THE COURT: All right. Well, I just want to make sure you understand you do have the right --

THE DEFENDANT: Yes, ma'am.

THE COURT: -- to address the Court, and if you want to do that, I'm happy to listen to you. But if you'd like to have Mr. Mills relay information to me on your behalf, that's fine as well.

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. All right.

MR. MILLS: And Your Honor, doing this on behalf of myself and Mr. Harvey, and of course what Mr. Dunlap wants relayed is obviously these events have portrayed one side and probably the worst side of his life but not necessarily a whole picture of who he is.

So, I think that he wants the Court to understand as well that he has not had an experience with the criminal justice system, and that the sentence that he's looking at is equal to the amount of time he's lived this far, and that the sentences -- that he understands and accepts the seriousness of the consequences that's going to happen and asks the Court to just to take in consideration his age and his criminal history and the love of his family and the return for that in setting a sentence today.

THE COURT: All right. Thank you. All right. Well, I believe that we correctly calculated the guidelines and have noted the right and applicable statutory factors. And I think considering, you know, everything I have heard here, we have two serious, two very serious offenses; the drug trafficking offense, the drugs involved, the quantities involved, you know, it's just a very serious, serious problem.

And you know, having tried this case, I'm familiar with all the different members of this conspiracy and this

organization, just sort of the brazen, aggressive nature of it.

I mean, co-defendant Glenn Pernell that everybody's taking orders from is incarcerated. And all these folks are doing his bidding because he's incarcerated. We're paying to keep him locked up, and Mr. Dunlap and others are making sure he just keeps on, keeps on trucking on with his illegal business. And all the problems that are created by these kinds of drug organizations, I mean, they are well known to everybody.

Then of course, they are serious and that's why the statutes provide what they provide and that's why the guidelines are as steep as they are because they are meant to deter people from engaging in this kind of conduct.

And we also have to me an equally, perhaps more serious offense, of the jury tampering. It's just very hard for me to think of anything that is more disruptive to our society than interfering with the right to a jury trial. Everybody relies on that. Criminal defendants rely on that, I rely, the public relies on it. It's a system.

And the cavalier just to be sitting here in a trial for three weeks and having your family there viewing you. Lucky to be out bond. And what do you do with that right? Well, you get in the car with your family members and try to intimidate a juror.

I mean, it's a miracle that we didn't have a mistrial. If it hadn't been for my courtroom deputy making sure he did not have any contact with any of the other jurors, it would have been a mistrial, we'd have had to start all over again. It's almost four weeks of trial.

I mean, think about the costs to the government. All the taxpayers are paying for that. And everybody out here is coming into this courtroom, especially a federal courthouse, and knowing, being able to rely on the fact that the -- with the lawyers both doing what they are supposed to do and me doing what I'm supposed to do, that the defendants are going to get a fair trial and that jury is going to decide their fate based on evidence, not on bribes.

But to just do that, I just -- I find that unimaginable. And I know when I have talked with people, say oh gosh, in all the years that I have been doing this, that has never happened. Well, I hope that's true, but I suspect it's not. You just picked the wrong juror to bribe. I'm sure some jurors have been bribed and justice has not been carried out because of that.

But if I have got anything to do with it, people are going to understand, cannot do that. It's just -- it's just so beyond the pale. It's not just an offense to me and the people that are doing the trial, it's an offense to society to come in and mess with the judicial system like that, that

you're going to bribe somebody.

I mean, it's just -- it's a miracle that we were able to get through that without it all being a waste. So any way, I'm obviously concerned about that.

When I look at the 3553(a) factors, which is what I have to in every sentencing, and think about the reasons that the defense has put forth for me to vary below those -- and I'm not one to hesitate about varying. I do it all the time when I think it's appropriate. But save for one small factor, I don't see anything that would justify a variance on your part.

You think about the purposes of sentencing, and a lot of times I'm thinking how much will it take to get this person's attention and get them on a different path and sort of have a calculus for that, but I'm sorry to say for you my main concern is just keeping you out of circulation because you weren't deterred.

Here you have been indicted by a federal grand jury, going to trial in a case with the damning evidence against you, okay, and you're -- are you hesitating to commit a crime? Your family is not. They see all this going on, too. They are not hesitating. There's not one bit of respect for the judicial system and for our laws, and I don't know if you'll ever learn that. I -- I don't know.

But I did say save for one factor, and that is your

criminal history is a two, and it's a well-earned two. I do not think that it's substantially overstated at all. I mean, you did in fact commit those crimes and you were only assigned a single point for those. But the result of that has I think in your case led to a result that's maybe a little bit more than necessary.

So for that reason, I am going to grant a variance from the bottom of the guideline down to -- I'm going to vary by 30 months, which is approximately the result of moving you out of a criminal history category one to a criminal history category two as a result of those simple possession of marijuana convictions.

So, having calculated and considered the advisory sentencing guidelines and also the relevant statutory sentencing factors that are contained in 18 USC 3553(a), it is the judgment of the Court that the defendant, Terrence Vernon Dunlap, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 232 months.

This term consists of 232 months as to Count One, 48 months as to Count 21, and 232 months as to Count 49. In Count One -- okay. That's not right. 230 months -- 232 months as to Count One, 48 months as to Count 21, and 232 months as to Count 49 and Count One, said terms to run concurrently.

Defendant shall also forfeit his interest in property as

directed in the preliminary order of forfeiture that was filed earlier today, and that order is incorporated into this judgment.

It appears that Mr. Dunlap does not have the ability to pay a fine, and therefore the fine is waived. But he shall pay the mandatory $400 special assessment fee consisting of a hundred dollars as to each count, which is due and payable immediately.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years. This term consists of five years as to Count One, one year as to Count 22, and three years as to Count 49 and Count One of the other docket, those terms to run concurrently.

While on supervised release, the defendant shall comply with the mandatory and standard conditions of supervision that are outlined in 18 USC 3583(d) and guideline 5D1.3(a) as noted in paragraphs 94 and 97 of the presentence report.

Standard conditions of supervision one through nine and 13 serve the statutory sentencing purposes of public protection and rehabilitation.

Standard conditions of supervision 10 and 12 serve the statutory sentencing purpose of public protection.

And standard condition of supervision 11 ensures that the defendant does not engage in conduct that may potentially conflict with the other conditions of supervision and may

pose risk to the defendant's probation officer.

The defendant shall also comply with the following special conditions for the reasons that are set forth in the presentence report which has previously been adopted as the finding of facts for the purposes of this sentence: The defendant must submit to substance abuse testing to determine if he has used a prohibited substance and, if able, he shall contribute to the cost of that program not to exceed the amount that is determined reasonable by the Court-approved US Probation Office's sliding scale for services, and cooperate in securing any applicable third party payment such as insurance or Medicaid.

So as to Counts One, 21, and 49 of the superseding indictment in docket 3:17-811 and Count One of the indictment in docket 3:19-781, I find this sentence is reasonable under the facts and circumstances of these cases and that it is sufficient but not greater than necessary to achieve the purposes of sentencing.

That is my sentence. Are there any substantive or procedural errors anyone wants to bring to my attention?

MS. TAYLOR: Not by the government, Your Honor.

MR. MILLS: Not on behalf of Mr. Mills.

MR. HARVEY: None, Your Honor.

THE COURT: Okay. All right. Let me tell Mr. Dunlap, sir, you have 14 days from the date of the judgment

order to file any notice of appeal. All right.

Anything further on this matter?

MS. TAYLOR: I don't believe so. I don't believe there would be any counts to dismiss. I will ask--

THE COURT: That's right.

THE CLERK: The original indictment and Count 20 of the superseding indictment that--

MS. TAYLOR: Did we not dismiss Count 20 at the time of the trial?

THE CLERK: You did, but...

MS. TAYLOR: All right. We move to dismiss any remaining counts of which he was not convicted.

THE COURT: All right.

MR. MILLS: Your Honor?

THE COURT: Yes.

MR. MILLS: There's one point of clarification when we were discussing with Mr. Dunlap about his notice of intent to appeal with these two cases. Do we need to file two separate notices of intent to appeal with the Clerk's office?

THE CLERK: Yes, he does.

THE COURT: Yes.

MR. MILLS: Okay.

THE COURT: Yes. Okay?

MR. MILLS: Will do.

THE COURT: All right. Thank you.

MS. TAYLOR: Thank you, Your Honor.

(Hearing concluded.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Kathleen Richardson

_____ March 17, 2022

Kathleen Richardson, RMR, CRR